U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 211 51372 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a publishing and printing firm. It seeks to employ the beneficiary permanently in the United States as a sales representative. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence and asserts that the petitioner has had the financial ability to pay the beneficiary's proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 18, 1997. The proffered wage as stated on the Form ETA 750 is $24.52 per hour, which amounts to $51,001.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claims to have been established in 1998, to have a gross annual income of 585,000, and to currently employ one worker. In support of its ability to pay the proposed annual wage offer of $51,001.60, the petitioner submitted partial copies of its Form 1120, U. S. Corporation Income Tax Return for 1999 and 2000. They indicate that the petitioner was incorporated on January 23, 1997 and files its taxes based on a standard calendar year. The 1999 corporate tax return shows that the petitioner reported $138 as its net income. Schedule L of the tax return reflects that the petitioner had $6,144 in current assets and $3,569 in current liabilities, resulting in $2,575 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets and current liabilities are shown on

[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items

Schedule L. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner's 2000 corporate tax return indicates that the petitioner declared $939 in net income. It had $781 in current assets and $5,329 in current liabilities, resulting in -$4,548 in net current assets, as shown on Schedule L.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 24, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted corporate tax returns for the petitioner for 1997 through 2001. The tax returns for 1997, 1998, and 2001 reflect the following information:

	1997	1998	2001
Net income	-$ 22	$ 2,287	$ 351
Current Assets	$6,110	$ 7,359	$1,078
Current Liabilities	$5,930	$16,369	$2,063
Net current assets	$ 180	-$ 9,010	-$ 985

In addition, counsel submitted a letter from an accountant expressing confidence that the petitioner has the ability to pay the proffered wage because the sole shareholder had taken substantial officer compensation, which could have covered the proffered wage, and because a sales representative will generate additional revenue for the petitioner.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on April 7, 2003, denied the petition. The director reviewed the petitioner's net income and net current assets as shown on its tax returns and concluded that neither source reflect sufficient levels to cover the beneficiary's proposed annual wage offer of $51,001.60.

On appeal, counsel again asserts that the petitioner's sole shareholder could have taken less officer compensation to meet the proffered wage Counsel's assertion is not persuasive. If there is no indication that a petitioner has employed and paid a beneficiary an amount at least equal to the proffered wage during the relevant period, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc.*

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having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

v. Sava, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages or other compensation in excess of the proffered wage is insufficient. Monies already expended as wages or officer compensation are not available to pay the proffered wage. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Moreover, it is noted that in 1998 and 1999, the corporate tax returns show that no officer compensation was paid. Although counsel refers to the salaries and wages that the principal shareholder deducted for his own use during those periods, no first-hand evidence of this claim has been presented. The assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988).

It is noted that counsel's appellate arguments refer to minutes of a 1994 AILA conference with the Vermont Service Center and a 2003 AILA conference with the California Service Center. Such discussions are not binding on the AAO. Citizenship and Immigration Services (CIS), through the AAO, is not bound to follow any contradictory guidance or decision of a service center. *Louisiana Philharmonic Orchestra v. INS,* 44 F. Supp.2d 800, 803 (E.D. La. 2000), *aff'd,* 248 F.3rd 1139 (5th Cir. 2001), *cert. denied,* 122 S.Ct. 51 (2001).

On appeal, counsel submits a letter from the petitioner's principal shareholder explaining that an independent contractor has been employed as a sales representative since 2000, but plans to resign once the beneficiary is hired. Copies of Form 1099-Miscellaneous Income, issued by the petitioner to the independent contractor are submitted in support of this assertion. They show that the petitioner paid him $68,644 in 2000, $44,679 in 2001, and $26,640 in 2002. Even if this argument were persuasive, the evidence shows that these payments only exceeded the proffered wage of $51,001.60 in one year. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay the proffered wage beginning as of the visa priority date.

Counsel also argues that the beneficiary will contribute to an increase in business for the petitioner. It is noted that the record contains no evidence of this projected increase in profits or any information from which this asserted increase in business might be estimated. The prospective increase in profits hypothesized by counsel is not supported by evidence in the record and cannot be considered in this case. Counsel does not explain how the petitioner will generate more income than the independent contractor he is supposed to replace.

Counsel maintains that the petitioner has a line of credit from which to draw in order to cover the proffered wage. Counsel states that the principal shareholder's letter, submitted on appeal, also mentions this line of credit. The AAO can find no mention of a line of credit in the principal shareholder's letter. Rather, the principal shareholder states that he could issue more stock to generate additional revenue. This argument is too vague to be persuasive and does not demonstrate that an ability to pay the beneficiary's proposed wage offer has existed since the visa priority date. Similarly, a line of credit is a commitment to loan and represents a bank's unenforceable commitment to make loans to a particular borrower for a specified length of time. Since it is not an existing loan, those funds do not represent readily available sources out of which a proffered wage may be paid. As noted above, a petitioner must establish eligibility as of the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Also, any existing loans would be reflected in the balance sheet provided in the tax return or

audited financial statements that a petitioner may provide and would be fully considered in the evaluation of the petitioner's net current assets.

Finally, counsel asserts that *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. That case relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner had been in business for over 11 years and was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. No unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa.* The petitioner's corporate tax returns do not establish a framework of profitable years, but rather show that the petitioner's net income has been extremely modest and its gross receipts or sales have declined from $951,351 to $585,437 during the period covered by the federal tax returns.

Based on the evidence contained in the record and after consideration of the financial data further presented on appeal, we cannot conclude that the petitioner has demonstrated its ability to pay the proffered as of the priority date of the petition and continuing until the present.

Beyond the decision of the director, it is noted that the terms of Item 14 of the ETA-750A require that an applicant for the position of sales representative have three years of work experience in the job offered. The letter offered to the record to establish the beneficiary's relevant past work experience states that he was employed by "Continent-M" from June 1992 to May 1995. It raises a question as to whether it represents a full three years of past work experience as a sales representative because it does not state specific dates of employment commencement and departure.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.